Supreme Court of the United States

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
APPELLANT,

vs.

CORPORATION TAX APPEAL BOARD OF THE STATE OF MICHIGAN

Appeal from the Supreme Court of the State of Michigan.

MEMORANDUM AFTER ORAL ARGUMENT

At the oral argument on Friday afternoon, questions in various forms from Mr. Chief Justice Hughes, Mr. Justice Stone and Mr. Justice Roberts were directed to the proposition of whether it was the position of the Appellant that

THE STATE HAS NO POWER TO IMPOSE AN ANNUAL PRIVILEGE TAX (SUCH AS MICHIGAN ATTEMPTS TO HERE IMPOSE) UPON A DOMESTIC CORPORATION WHEN THE BUSINESS OF THAT CORPORATION LIMITED BY THE PURPOSE CLAUSE OF ITS CHARTER, IS EXCLUSIVELY THAT OF FOREIGN COMMERCE.

It is the position of the Appellant that no state has such power. At the risk of repetition, with a view of making clear and substantiating our position, this added Memorandum is submitted.

Appellant upon incorporation in 1927 paid the incorporation tax imposed by a different provision of the statute than is here involved. That tax is for the privilege of being—existing as a corporation. It is a privilege granted to individuals to do the business specified in the charter in a corporate capacity. There is no other statutory provision of Michigan for a further imposition of a tax for the privilege of existing, being, continuing to exist or be. The Michigan court has recognized and made this distinction between the organization (franchise) tax and the annual tax for the privilege "to do". *Union Steam Pump Sales Corp. v. Secretary of State,* 216 Mich. 261.

The annual privilege tax in question, in the case at bar, is an annual privilege tax chargeable to the Corporation (not to the incorporators or stockholders) "for the privilege of exercising its franchise and of transacting its business within the State." (See statute here involved, pages 10 and 11 of our first Brief.) In other words, the tax is imposed for the privilege of the corporation doing the business for which organized or which is permitted under its charter. Where the corporation is permitted to do a local business, then it is required to pay for the privilege of doing this business, even though it never elects to exercise this particular privilege. However, where the corporation, as in the case at bar, is limited in its purpose to engaging exclusively in foreign commerce and has no power to do a local business, a state is without power to impose an annual privilege tax upon it for the privilege of doing a local business within the state when under its corporate charter it is not permited to engage in a local business. Mr. Justice Roberts inquired whether there were any authorities in support of this proposition, and we responded that there were no Michigan authorities, and that this is the first case dealing with this question in Mich-

igan. We should have also added that the United States Supreme Court has several times announced the very rule which we here submit should again be followed in the case at bar.

In the case of *Philadelphia & Southern Steamship Co. v. Pennsylvania,* 122 U. S. 327, a domestic corporation was engaged exclusively in interstate commerce (as the Appellant in the case at bar is engaged exclusively in foreign commerce), carrying people from the shores of one state over a navigable stream to the shores of another state. The State of Pennsylvania attempted to impose an annual tax upon the corporation, which the Attorney General for the State of Pennsylvania contended was an annual privilege tax on the franchise of doing business. The tax was held invalid, the court saying at page 342 as follows:

> "If intended as a tax on the *franchise of doing business*—which in this case is the business of transportation and carrying on interstate and foreign commerce it would clearly be unconstitutional. It was held by this Court in the case of *Gloucester Ferry Company v. Pennsylvania,* 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals."

The Attorney General for Pennsylvania further contended, that although a privilege tax could *not* be imposed upon a foreign corporation which was engaged exclusively in foreign commerce, nevertheless it might be imposed upon a domestic corporation which derives its franchise to be a corporation from the taxing state. A like argument is made by Appellee in the case at bar. In other words it is contended by the Attorney General for the State of Michigan that since the Appellant derives its franchise

to be a corporation from the State of Michigan, the State of Michigan might further impose this annual tax upon it for the privilege of exercising that franchise to do business permitted by its charter, even though that business be exclusively that of foreign commerce. The United State Supreme Court has held that this theory submitted by the Attorney General of Michigan cannot be sustained, saying in the *Philadelphia & Southern Steamship Company* case, at page 344:

> "The decision in this case and the reasoning on which it is founded so far as they relate to the taxation of interstate commerce carried on by corporations, *apply equally to domestic and foreign corporations.* No doubt the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are *exercising a franchise.*"

A similar rule was recently announced by this court in the case of *Ozark Pipe Line Corp. v. Monier,* 266 U. S. 555. In that case a foreign corporation was involved. It became domesticated in the State of Missouri, and in obtaining its license to do business in Missouri, it was stated that the business which it would engage in in Missouri was exclusively to carry crude oil from one state through Missouri to another state, which was exclusively the business of interstate commerce. It was contended by the Attorney General that since this foreign corporation had domesticated in Missouri that it in fact obtained a franchise in Missouri like that granted to a domestic corporation, and, therefore, it could

be subjected to an annual privilege tax for exercising this franchise (a tax similar to that involved in the case at bar), even though that corporation engaged in no local business in Missouri and engaged exclusively in interstate commerce. This court held this contention without merit and held the tax invalid, Mr. Justice Sutherland speaking for the court in this connection saying at page 562:

> "The tax is one upon the privilege or right to do business, *State Ex rel v. State Tax Commission*, 282 Mo. 213, 234; *and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed.* It long has been settled that a State cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on."

And at page 567:

> *"Nor is it material that appellant applied for and received a Missouri license* or that it had the power thereunder to exercise the right of eminent domain. These facts could not have the effect of conferring upon the State an authority, denied by the Federal Constitution, to regulate interstate commerce. *The State has no such power even in the case of domestic corporations.* See *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, 342. The statute as applied to appellant is unconstitutional."

For a further discussion of this point see our first Brief, pages 47-52.

Supplementing the discussion of the *Detroit & Windsor Ferry Company* case in our Brief on pages 53-56, and our Reply Brief, pages 10, 11, attention should be called to the statement of the Michigan court, below, that the hold-

ing in the *Detroit & Windsor Ferry Company* case was not based upon the fact that corporation in that case had local powers. In making that statement, the Michigan court undoubtedly had overlooked its position taken in the case of *In Re G. H. Hammond Company,* 246 Mich. 179, in which it distinguished the *Detroit & Windsor Ferry Company* case from the *G. H. Hammond Company* case on the very ground that the Detroit & Windsor Ferry Company actually engaged in and had power to engage in a local business, saying at page 184 in the *G. H. Hammond Company* case as follows:

> "They also cited to that effect *in re Johnston-Newton Co.,* 226 Mich. 40, and *In re Detroit & Windsor Ferry Co.,* 232 Mich. 574. The question now under consideration was not raised in any of those cases. *In each of them the corporation was admittedly doing business in Michigan,* and the question of the application of this statute to a domestic corporation not doing business in Michigan was in no way involved."

The determination of the Michigan court as to whether the application of the Michigan tax in the case at bar violates the Federal Constitution is not binding upon this court as to the constitutional question involved. *New Jersey Bell Telephone Co. v. State Board of New Jersey,* 280 U. S. 338, 346; *Macallen Company v. Massachusetts,* 279 U. S. 620, 625; *Educational Films Corp. v. Ward,* 282 U. S. 379, 387, 388.

Respectfully submitted,

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